

January 14, 2002
DA 02-41

J. Curtis Henderson
Senior Vice President & General Counsel
Nucentrix Broadband Networks, Inc.
200 Chisholm Place, Suite 200
Plano, Texas 75075

Peter D. Shields, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

**Re: Petition of Nucentrix Spectrum Resources, Inc., for Deferral of
Installment Payments**

Dear Messrs. Henderson and Shields:

This letter responds to the Petition filed by Nucentrix Spectrum Resources, Inc. (“Nucentrix”) seeking deferral of its installment payment obligations for a Multipoint Distribution Service (“MDS”) license in Basic Trading Area 261 (“BTA 261”).¹ For the reasons set forth below, we deny Nucentrix’s Petition.

On March 28, 1996, the Commission completed its auction of MDS licenses in 493 Basic Trading Areas and BTA-like areas (Auction No. 6).² Nucentrix was the high bidder on several licenses, including the license for BTA 261, an area covering Longview, Washington.³ As a small business, Nucentrix was eligible to participate in the Commission’s installment payment program.⁴ After grant of the license for BTA 261, the Commission’s rules required that Nucentrix make quarterly installment payments.⁵ Nucentrix asserts that with the exception of the license for BTA 261, it made timely installment payments.⁶ Nucentrix also concedes that its request for deferral of payments was not timely.⁷

¹ Petition of Nucentrix Spectrum Resources, Inc. for Deferral of Installment Payments, filed October 12, 2000 (“Petition”).

² “Winning Bidders in the Auction of Authorizations to Provide Multipoint Distribution Service in 493 Basic Trading Areas: Down Payments Due April 5, 1996, FCC Form 304s/Statements of Intention Due May 10, 1996,” *Public Notice* (rel. March 29, 1996) (“Winning Bidders’ Public Notice”).

³ *Winning Bidders’ Public Notice* at Attachment A, p. 22. At the time of the Auction, Nucentrix was known as Heartland Wireless Commercial Channels, Inc. To avoid confusion, all references will be to Nucentrix and not Heartland.

⁴ See 47 CFR § § 1.2110, 21.960(b) (1996).

⁵ *Id.*

⁶ Petition at 2.

⁷ *Id.* at 3.

Pursuant to the installment payment grace period rules then in effect,⁸ a licensee had an automatic 90-day period after the installment payment due date during which payment might be submitted (“non-delinquency period”), with a five percent late fee. If remittance of the missed installment payment and the five percent late fee was not made before the expiration of the non-delinquency period, the rule provided for a second automatic 90-day period in which to remit payment (“grace period”) and required an additional late fee equal to ten percent of the missed payment.⁹ Failure to make a payment, including the total 15 percent late fee by the end of the second 90 day period results in automatic cancellation of the license. Nucentrix concedes that it failed to make its request for deferral of payments prior to automatic cancellation of its license.¹⁰

In its Petition, Nucentrix seeks deferral of its installment payments, which we treat as a request for waiver of the Commission’s Rules regarding late installment payments for MDS licenses. In support of its Petition, Nucentrix claims that the Longview BTA is the only license, out of the 91 licenses it holds, for which timely payments have not been submitted.¹¹ Further, Nucentrix alleges that its failure to submit a timely payment was due to the administrative complexity of managing the payments on a large number of licenses. Nucentrix further alleges that the oversight occurred while it was in negotiations to assign its license for the Longview BTA to a third party.¹²

In order to grant Nucentrix the relief that it requests, the Commission must consider whether the underlying purpose of the installment payment rule would not be served or would be frustrated by application to the instant case, and whether a grant of the requested waiver would be in the public interest; or whether unique or unusual factual circumstances make application of the rule inequitable, unduly burdensome or contrary to the public interest; or whether Nucentrix has no reasonable alternative.¹³ Applying these factors, as we explain below, Nucentrix has failed to provide a basis for waiver of the installment payment rule.

Neither the number of licenses upon which Nucentrix had to submit installment payments

⁸ 47 CFR § 1.2110(f)(4) (1999). The Part 1 rules referenced in this *Order* have been amended to reflect the use of quarters for implementation of the Commission’s payment deadlines and attendant grace period rules. Amendment of Part 1 of the Commission’s Rules-Competitive Bidding Procedures, WT Docket 07-82, *Order on Reconsideration of the Third Report and Order, Fifth Report and Order, and the Fourth Further Notice of Proposed Rulemaking*, 15 FCC 15293 (2000) (“*Part 1 Third Report and Order Recon*”). These changes have no effect on Nucentrix’s position or the Commission’s evaluation of its arguments. The amended Part 1 rules became effective on October 30, 2000, 60 days after the date of their publication in the Federal Register. 65 Fed. Reg. 52323, 52336 (Aug. 29, 2000).

⁹ 47 CFR § 1.2110(f)(4) (1999). When the Commission abandoned its burdensome policy of reviewing grace period requests on a case-by-case approach and adopted its current rules allowing for two automatic 90 day grace periods, it did not extend the date upon which the payment was due and payable to the Commission. In other words, the last day of the 180 day grace period did not become the due date of the payment.

¹⁰ Petition at 3.

¹¹ *Id.* at 2-3.

¹² Petition at 2.

¹³ 47 CFR § 1.925.

nor the negotiations concerning a possible assignment of the license present unique or unusual factual circumstances. Many licensees are obligated to keep track of the installment payment status of multiple licenses. Similarly, many licensees enter into negotiations to assign a license.¹⁴ The Commission has recently held that the failure of a licensee to properly organize and manage its business dealings is not a unique circumstance that warrants the granting of a waiver.¹⁵ Thus, Nucentrix's failure to adequately track its payment obligations does not present unique or unusual circumstances warranting a waiver of the Commission's rules.

Although Nucentrix failed to address the issue, as we explain below, the underlying purpose of the Commission's rules would not be served by waiver in this instance. The licenses were conditioned upon the full and timely performance of the payment obligations,¹⁶ which the licensee failed to fulfill. The Commission has repeatedly emphasized the importance of full and timely payment.¹⁷ Strict enforcement of payment rules enhances the integrity of the auction and licensing process by ensuring that applicants have the necessary financial capacity and that spectrum is awarded to those qualified bidders who value the spectrum most. Moreover, requiring licensees to comply with the full and timely payment rule is essential to a fair and efficient licensing process.¹⁸ It is fair to all participants in our auctions, including those who won licenses in the auction and those who did not, and it fosters the promotion of economic

¹⁴ Letter from Margaret Wiener, Chief, Auctions and Industry Analysis Division, to Russell H. Fox, Esq. and Russ Taylor, Esq., DA 01-1319 (rel. June 1, 2001) ("[t]he existence of a potential assignee does not negate the licensee's failure to comply with the Commission's rules."); *see also* In the Matter of Southern Communications Systems, Inc., Request for Limited Rule Waiver to Comply with PCS Installment Payment for C Block Licenses in the Cleveland, TN BTA, *Memorandum Opinion & Order*, FCC 00-433 at ¶ 15 (rel. Dec. 21, 2000) ("*Southern MO&O*"), *further recon. den. Second Memorandum Opinion and Order*, FCC 01-298 (rel. Oct. 12, 2001).

¹⁵ *See Southern MO&O*, at ¶ 10.

¹⁶ 47 C.F.R. § 21.960(b)(4) (1996) ("A BTA authorization issued to an eligible winning bidder that elects installment payments shall be conditioned upon the full and timely performance of the BTA authorization holder's payment obligations under the installment plan."); *see also* Nucentrix Security Agreement at ¶ 11 ("The debtor recognizes that its continued retention of the License, and rights to operate as a Commission licensee thereunder, are conditioned upon compliance with all Commission orders and regulations applicable to the License and the Communications Act of 1934, as amended.").

¹⁷ *See Southern MO&O* at ¶ 15; In the Matter of Licenses of 21st Century Telesis, Inc. For Facilities in the Broadband Personal Communications Service, *Memorandum Opinion & Order*, FCC 00-434 at ¶ 10 (rel. Dec. 21, 2000) ("*21st Century MO&O*"); In the Matter of Public Notice DA 00-49 Auction of C and F Block Broadband PCS Licenses NextWave Personal Communications, Inc. and NextWave Power Partners, Inc., Petition for Reconsideration, In re Settlement Request Pursuant to DA 99-745 For Various Broadband PCS C Block Licenses, *Order on Reconsideration*, 15 FCC Rcd 17500, 17507-17508, ¶¶ 12-13 (2000) ("*NextWave Order on Reconsideration*") *rev'd. on other grounds and remanded*, *NextWave Personal Communications, Inc. and NextWave Power Partners, Inc. v. Federal Communications Commission*, 254 F.3d 130 (D.C. Cir. 2001), *Petition for Certiorari* filed, 70 USLW 3317 (Oct. 19, 2001) (No. 01-654); "Wireless Telecommunications Bureau Will Strictly Enforce Default Payment Rules; Bureau to Re-Auction Licenses Quickly," *Public Notice*, DA 96-481, 11 FCC Rcd 10853 (1996) (WTB).

¹⁸ Amendment of the Commission's Rules Regarding Installment Payment Financing of Personal Communications (PCS) Licensees, WT Docket No. 97-82, *Order on Reconsideration of the Second Report and Order*, 13 FCC Rcd 8345, 8348 at ¶ 8 (1998).

Nucentrix Spectrum Resources, Inc.
J. Curtis Henderson, Esq.
Peter D. Shields, Esq.
January 14, 2002
Page 4

opportunity and competition in the marketplace.¹⁹

For the reasons detailed above, Nucentrix's Petition requesting deferral of its installment payment obligations and waiver of the Commission's installment payment rules **IS DENIED**. This action is taken pursuant to sections 4(i), 303(r), and 309(j) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), 303(r), and 309(j), and the authority delegated pursuant to section 0.331 of the Commission's Rules, 47 C.F.R. § 0.331.

Sincerely,

Margaret W. Wiener, Chief
Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

¹⁹ See *NextWave Order on Reconsideration*, 15 FCC Rcd at 17514, ¶ 25.